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No. 01-94

In The

# Supreme Court of the United States

HON. BOB SCHAFFER, member of the United States House of Representatives,

*Petitioner,*

v.

PAUL O'NEILL, Secretary of the Treasury,

*Respondent.*

**On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

John C. Eastman
The Claremont Institute Center
For Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Drive
Orange, CA 92866
(714) 628-2587

Edwin Meese III
*Counsel of Record*
214 Massachusetts Ave., N.E.
Washington, D.C. 20002
(202) 546-4400

Richard Epstein
1111 E. 60th St.
Chicago, IL 60637

*Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence*

## QUESTION PRESENTED

1. Whether a member of Congress has standing either *as a taxpayer* or *as a member of Congress* to challenge alleged violations of the Twenty-Seventh Amendment?

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**BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

## INTEREST OF AMICUS CURIAE[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

issue in this case, that the Constitution's limitations on federal power are judicially enforceable. The Institute pursues its mission through academic research, publications, and scholarly conferences. Of particular relevance here, Institute scholars have published a number of books and monographs on the manner in which Congress has exceeded its Constitutional limitations and on the importance of permitting judicial review of those Constitutional violations. *See, e.g.*, GORDON JONES AND JOHN MARINI, THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS (1989); John C. Eastman, *Restoring the "General" to The General Welfare Clause*, 4 CHAPMAN L. REV. 63 (2001).

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, whose purpose is to further the mission of the Institute through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance. The Center has previously participated as amicus curiae in this Court in such important cases as *Adarand Constructors* v. *Mineta*, No. 00-730 (pending); *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States* v. *Morrison*, 529 U.S. 598 (2000); and *Boy Scouts of America* v. *Dale*, 520 U.S. 640 (2000).

## STATEMENT OF THE CASE

Written in 1789 and ratified in 1992, the Twenty-Seventh Amendment holds that "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." The state legislature of Michigan ratified this amendment on May 7, 1992, becoming the 38th state legislature to do so and thus meeting the three-fourths requirement specified in Article V of the Constitution. Congress acknowledged the newly-ratified Amendment as part of the Constitution two weeks later. *See* S. Con. Res. 120, 102d Cong., 2d Sess. (May 20, 1992).

Just before the Amendment was ratified, Congress

passed a law to permit automatic "Cost of Living Adjustments" (COLAs) in the rate of pay for its members. *See* 101 P.L. 194, 103 Stat. 1716, Title XI (2001). This statute sets forth a formula for determining by what amount "the rate of pay of each office and position of United States Senator, the President pro tempore of the Senate, and the majority and minority leaders of the Senate shall be increased." *Id.*

Hon. Bob Schaffer, a Representative from Colorado, joined with other taxpayers to bring this suit challenging the COLA provisions under the Twenty-Seventh Amendment. *See Schaffer* v. *Clinton*, 54 F.Supp.2d 1014 (D. Colo. 1999). The District Court further held that taxpayer plaintiffs (other than Congressman Schaffer) in the case did not have standing to bring suit. *Id.*, at 1017-1018. The District Court held that Congressman Schaffer did have standing, but that the Amendment did not prohibit the COLAs. *Id.*, at 1024. On appeal, the Tenth Circuit rejected the District Court's holding that Congressman Schaffer had standing to bring the case, and thus did not reach the substantive claims. *Schaffer* v. *Clinton*, 240 F.3d 878, 886 (10th Cir. 2001).

## SUMMARY OF ARGUMENT

The petition for *certiorari* should be granted in this case for at least three reasons:

- First, the Tenth Circuit's decision is contrary to this Court's holding in *Flast v. Cohen*, 392 U.S. 83 (1968). Although this Court has thus far declined to recognize taxpayer standing to challenge violations of any constitutional provision other than the First Amendment's Establishment Clause, the newly-adopted Twenty-Seventh Amendment is as much an explicit limitation on the spending power of Congress as the Establishment Clause. Congressman Schaffer, in his capacity *as a taxpayer*, should therefore have as much right to challenge the constitutionality of acts of Congress under the Twenty-Seventh Amendment as other taxpayers have to challenge the

constitutionality of acts of Congress under the Establishment Clause;

- Second, the Tenth Circuit's failure to afford Congressman Schaffer standing as a taxpayer failed to recognize that the jurisdiction of Article III courts extends to all cases *in equity* as well as in law. Courts of equity were designed in part to address the problem of structural violations causing harm to a large but undifferentiated class of people;

- Third, Tenth Circuit misapplied this Court's most recent decision addressing standing by members of Congress and its decision directly conflicts with D.C. Circuit's decision in *Boehner* v. *Anderson*, 30 F.3d 156 (D.C. Cir. 1994), holding that a member of Congress had standing to challenge the same statute providing automatic cost-of-living-adjustments (COLAs) to congressional salaries at issue here because of the Congressman's asserted reputational harm.

The Tenth Circuit's decision is particularly troubling because, if allowed to stand, an entire Amendment to the United States Constitution will be rendered a dead letter.

## REASONS FOR GRANTING THE WRIT

### I. The District Court's Denial of Standing to the Taxpayer Plaintiffs, and the Tenth Circuit's Failure to Afford Congressman Schaffer Standing in his Capacity as a Taxpayer, is Contrary to this Court's Holding in *Flast* v. *Cohen*.

The District Court dismissed the taxpayer plaintiffs (other than Congressman Schaffer) for lack of standing. Although that ruling was not appealed, the Tenth Circuit held that Congressman Schaffer – who is himself a taxpayer as well as a member of Congress – did not have standing to bring a Twenty-Seventh Amendment challenge to

congressional COLAs. The denial of standing to taxpayers challenging congressional spending that they claim is barred by an explicit constitutional prohibition is contrary to this Court's holding in *Flast* v. *Cohen*.

In *Flast*, this Court held that taxpayers may sue to enjoin federal expenditures that violate explicit constitutional prohibitions. Although *Flast* involved spending claimed to be in violation of the Establishment Clause, the rationale of *Flast* holds here as well, and should permit taxpayers to bring this suit.

Under *Flast*, a taxpayer will having standing to bring a suit against an expenditure of funds if he establishes: 1) "a logical link between that status and the type of legislative enactment attacked"; and 2) and a violation of "specific constitutional limitations imposed upon the exercise of the congress-ional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress." 392 U.S., at 102-03. When "both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." *Id.*, at 103.

These two requirements have been met in this case. First, taxpayers are the direct contributors to the funds from which members of Congress are paid; there is thus a clear link between the exactions from the taxpayer and the COLAs that automatically increase congressional salaries. Second, Congressman Schaffer challenges the COLAs as a violation of the Twenty-Seventh Amendment, which, like the Establishment Clause, provides a specific constitutional limitation on Congress's power under the Spending Clause.

Indeed, the history of the Twenty-Seventh Amendment demonstrates that it was designed to provide the same kind of express limitation on Congressional spending as the Establishment clause has been interpreted to provide. In *Flast*, this Court noted that it was proper to allow taxpayer standing in cases involving violations of the Establishment Clause because "[t]he Establishment Clause was designed as

a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id.* at 104.

The same concern with abuse of the government's tax and spend power underlies the Twenty-Seventh Amendment. Indeed, James Madison was the initial author of both provisions. *See* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992). He drafted the specific limitation now contained in the Twenty-Seventh Amendment because of the "seeming impropriety in leaving any set of men without countroul [*sic*] to put their hand into the public coffers, to take out money to put in their pockets." James Madison, *Speech in the House of Representatives* (June 8, 1789), *reprinted in* MADISON: WRITINGS 449, 450 (J. Rakove, ed., 1999); *see also* 1 RECORDS OF THE FEDERAL CONVENTION 373-374 (M. Farrand, ed. 1911); *id.* at 215-216 ("Mr. Madison...observed that...to leave [Congressmen] to regulate their own wages was an indecent thing, and might in time prove a dangerous one"); Edmund Randolph, *Letter to the Speaker of the Virginia House of Delegates* (Oct. 10, 1787), *reprinted in* 1 DEBATE ON THE CONSTITUTION at 595, 610 (B. Bailyn, ed. 1993) (urging an amendment "incapacitating the Congress to determine their own salaries").

Clearly, then, the history of the Twenty-Seventh Amendment, like that of the First Amendment, reveals an abiding concern with the potential (or actual) misuse of "the taxing and spending power" and also reveals that the Amendment was "designed as a specific bulwark against such potential abuses of governmental power." *Flast*, 392 U.S., at 103. By its plain language, that Amendment "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power

conferred by Art. I, § 8." *Id.*[2]

*Flast* was primarily concerned with the fact that laws exceeding the limited powers of Congress could violate the First Amendment by spending money to subsidize particular religious views. The only *injury* in such a case is the violation of the constitutional prohibition, with the consequent use of the taxpayer's funds for a purpose expressly forbidden by the Constitution. No "greater" injury was necessary, because the First Amendment was written to prevent precisely that injury, according to the Court in *Flast*.

In exactly the same way, the only *injury* to Congressman Schaffer in his capacity as a taxpayer is the violation of the newest provision of the Constitution, with the consequent use of his tax funds for a purpose now expressly forbidden. Following the rule in *Flast*, no "greater" injury should be required of the Petitioner. This is particularly true in a nation such as ours whose "first principles" include a Constitution of delegated, limited powers. *United States* v. *Lopez*, 514 U.S. 549, 552 (1995). The violation of those limitations and the increased tax burden occasioned by legislators who have acted, in Jefferson's words, "contrary to the natural rights of the other members of the society," by "enlarg[ing] their own powers, prerogatives or emoluments without restraint," is injury enough to satisfy the dictates of Article III. *See* Thomas Jefferson, *A Bill for Giving The Members of The General Assembly An Adequate Allowance*, (Dec. 12, 1778), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 322 (P. Kurland & R. Lerner, eds., 1987).

Indeed, the instant case is actually more compelling than *Flast*. Since *Flast* was decided, this Court has declined to exercise jurisdiction in matters that it believed could rightly be left to the political process. *See*, *e.g.*, *Garcia* v. *San*

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[2] Congress's power to determine the compensation of its members is found in U. S. Const Art. I § 6, but like the spending at issue in *Flast*, the constitutional means for deriving the funds used for the compensation is the Tax and Spend Clause of Art. I, § 8. Thus the Twenty-Seventh Amendment operates as a specific limitation on the § 8 spending power as well as the § 6 compensation power.

*Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). But reliance upon the political process to prevent Constitutional violations is particularly inappropriate when the violation is itself of a political process provision. *United States* v. *Carolene Products*, 304 U.S. 144, 152 n. 4 (1938); *Baker* v. *Carr*, 369 U.S. 186, 210-211, 229 (1962). In such cases, "the greatest deterrent" – indeed, perhaps the only deterrent – "to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes." *Illinois* v. *Krull*, 480 U.S. 340, 352 (1987).

Challenges arising under the Twenty-Seventh Amendment are necessarily matters for judicial review because the Amendment is itself specifically designed to allow the political process to check self-dealing by members of Congress. A violation of the Amendment simply cannot be cured by the very political process neutered by the violation. To rely upon the political process to cure such a violation, as the Tenth Circuit did, *see Schaffer*, 240 F.3d at 885, is for the judiciary to abandon its proper role in our constitutional system.

## II. The Tenth Circuit's Failure To Recognize Congressman Schaffer's Standing As A Taxpayer Ignored The Fact That The Jurisdiction Of Article III Courts Extends To All Cases Not Just In Law But In Equity As Well.

Perhaps more fundamentally, any interpretation of Article III that prevents taxpayer standing in the circumstances presented by this and similar cases simply fails to take account of the fact that Article III courts have jurisdiction over all cases "in law *and equity*" arising under the Constitution. U.S. Const. art. III, § 2. The hornbook definition of standing – an invasion of a *legally* protected interest that is concrete and particularized as well as actual and imminent – does not even purport to address the "equity" side of federal court jurisdition.

The law has always had a particularly difficult time providing redress for small injuries inflicted upon large

groups of people where no one has a particularized harm different from the harm suffered equally by everyone else.[3] In such situations, there is a real danger that "[t]he public's business becomes nobody's business because no person has the incentive to take steps to protect that interest." Richard Epstein, *Standing and Spending—The Role of Legal* and *Equitable Principles*, 4 CHAP. L. REV.1, 30 (2001). This problem is particularly acute when, as here, constituents have no incentive to vote their own representative out of office for unconstitutionally burdening those residing in another district. Also, constituents have little incentive (or ability) to vote their own representative out of office for unconstitutional acts which tend to benefit their own districts, especially when doing so would not prevent another district's congressman from continuing to "bring home the bacon." To expect the political process to take care of itself is therefore to create a sort of standoff, or "race to the bottom," where no representative dares to stop violating the Constitution until all the others stop first.

In transactions between private parties, the government serves as a supervisory power to redress such broad and shallow injuries. But when the government itself is the perpetrator, it can hardly be expected to commence an action to control its own misconduct. In order to keep alive Holt's hope of *ubi ius,ibi remedium,* the task is to position *someone* to challenge the system-wide irregularities. *See* Epstein,

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[3] Public choice economics demonstrates that governmental programs which burden a large population in a relatively small degree, but confer a large benefit on a small population, will tend to survive in the long run, regardless of their unfairness. This is because it will always be worthwhile to the beneficiary class to lobby the legislature for greater benefits, while those who pay the bill can never afford to unite to put a stop to the practice. *See further* JAMES BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); Robert D. Tollison, *Public Choice and Legislation*, 74 Va. L. Rev. 339, 341-342 (Mar. 1988) ("groups who can organize for less than one dollar in order to obtain one dollar of benefits from legislation will be the effective demanders of laws").

*supra*, at 22. The logical parties to make such a challenge in this case are those parties who stand on either side of the Twenty-Seventh Amendment window: the taxpayers who pay, and the Congressman who receives, the salary increased according to the COLA scheme.

Taxpayers are actually in a better position to bring such challenges, because theirs is the more recognizable harm. Yet the general bar on taxpayer standing, raised by the *legal* requirement of particularized harm, allows the government to engage in structural violations with impunity, just so long as it does so at the expense of *a lot* of people instead of a few. Such structural violations, causing widespread but diffused harms, is exactly what courts of *equity* were designed to prevent. *See* Federalist No. 78 (A. Hamilton) ("the courts were *designed* to be an intermediate body between the people and the legislature, in order, among other things, *to keep the latter within the limits assigned to their authority*" (emphasis added)).

In *Crampton* v. *Zabriskie*, this Court expressly recognized "the right of resident tax-payers to invoke the interposition of a court *of equity* to prevent an illegal disposition of the moneys of the county." 101 U.S. 601, 609 (1879) (emphasis added).[4] This was so because only it could "prevent the consummation of a wrong, when the officers of [the government] assume, in excess of their powers, to create burdens on property-holders." *Id.*; *see also* James Wilson, *Speech in the Pennsylvania Ratification Convention* (Dec. 1, 1787), *reprinted in* 1 DEBATES ON THE CONSTITUTION 820, 822-823 (B. Bailyn, ed., 1993) ("under this constitution, the legislature may be restrained, and kept within its prescribed

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[4] *Crampton* has never been overruled, but subsequent decisions such as *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), have limited its holding to cases brought against *cities* by taxpayers. This is a distinction without a difference. "[T]here is nothing to suggest that the right to enjoin illegal behavior in *Crampton* depended on the taxpayer being able to show some minimum level of financial harm.... [*Frothingham*] does not explain why the difference in the number of taxpayers at the federal level works a difference in principle." Epstein, *supra* at 35.

bounds, by the interposition of the judicial department").

Even today, the principle that federal courts of equity may address such structural (but undifferentiated) harms is routinely recognized in analogous contexts such as shareholder derivative suits, where individual shareholders are afforded standing to raise the claims of the entire class despite their lack of any particularized harm. *See, e.g.*, Fed. R. Civ. P. 23; *see also* Epstein, *supra*, at 49. There is no reason – textual or otherwise – why the "equity" language of Article III does not equally apply to taxpayer challenges to violations of the Constitution's structural limits. In such circumstances, it is particularly important for the federal courts to apply this Court's equity-based rule in *Flast* rather than the contrary, law-based rule in *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). The Circuit Court's failure to follow *Flast* therefore places its decision in conflict both with this Court and with Article III.

## III. The Tenth Circuit's Decision Misapplied *Raines* v. *Byrd* and Is In Direct Conflict with a decision of the D.C. Circuit.

Even assuming *Flast* does not apply to afford Congressman Schaffer standing as a taxpayer, the Tenth Circuit's rejection of Congressman Schaffer's standing as a member of Congress misapplied this Court's recent ruling in *Raines* v. *Byrd* and is in direct conflict with the D.C. Circuit's decision in *Boehner* v. *Anderson*, 30 F.3d 156 (D.C. Cir. 1994).

Current standing rules require that a plaintiff allege a legally cognizable injury, fairly traceable to the defendant's conduct, which a favorable judgment is likely to redress. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). Congressman Schaffer alleged that his personal reputation was injured by the unconstitutional mechanism for adjusting his pay as a Congressman. That injury is clearly within the scope of the language of the Twenty-Seventh Amendment, and is one that this Court has both the power and the "duty" to redress via its power of judicial review. *Marbury v. Madison*, 1 Cranch

(5 U.S.) 137, 177-178 (1803).

However, the Circuit Court held that Congressman Schaffer had no standing to bring this case because his injury was primarily political, and not cognizable by the court. In doing so, the Circuit Court mistakenly relied upon *Raines* v. *Byrd*, 521 U.S. 811 (1997), and expressly refused to follow the D.C. Circuit's decision in *Boehner* v. *Anderson*, a case directly on point.

### A. The Circuit Court Misapplied The Reasoning Behind This Court's Standing Jurisprudence in Holding That Congressman Schaffer is Seeking Redress of A Political Injury.

In holding that a Congressman has no standing to bring a case under the Twenty-Seventh Amendment, the Circuit Court relied heavily upon *Raines*. It held that because the COLAs apply to all Congressmen equally, Congressman Schaffer had not been "singled out" for any special injury sufficient to confer standing upon him under *Raines*. *See Schaffer* v. *Clinton*, 240 F.3d 878, 885 (10th Cir. 2001). But this misapplies *Raines* both substantively, and as a matter of policy.

In *Raines*, Senator Robert Byrd brought suit to challenge the constitutionality of the line-item veto. He alleged that he had been injured because the line-item veto "diluted his vote" as a member of Congress. The Court held that while "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified," legislators whose votes were merely rendered less potentially "effective" would not have standing to sue. *Raines*, 521 U.S., at 823, 825-826.[5] Moreover, the Court in

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[5] Other courts have also upheld "legislative standing" in certain situations. *See, e.g., Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974). In that case, the D.C. Circuit noted that the purpose of the standing

*Raines* was concerned with a perennial problem in American law: keeping political questions within the legislature, rather than in the courts. *See id.*, at 827 (warning that "the federal courts [might be] improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress").

Neither of these factors are present here. Rather than being asked to address a political question, this case asserts an actual violation of a specific constitutional provision. And rather than seeking protection of his legislative "effectiveness," Congressman Schaffer, as an elected representative of the people, is attempting to fulfill the duties of his office, which include the duty to "preserve, protect, and defend the Constitution of the United States." *See* U.S. Const. Art. VI § 3. He is not seeking a redress of a political decision, but asserting that the Constitution is being violated by a practice of Congress. The injury asserted by Petitioner is not "wholly abstract," and the attempt to litigate this matter is not "contrary to historical experience" (except insofar as the Twenty-Seventh Amendment, being less than ten years old, has never been considered by this Court before). Nor is this a case of plaintiffs attempting to "'vindicate value interests of concerned bystanders.'" *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982) (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Petitioner is asserting a concrete, actual injury: that the Constitution has been violated by the automatic statutory mechanism of the COLAs. The purpose of the "injury" prong is to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Such clarity does exist in this case.

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determination was not to bar cases which legitimately belong in court, but rather so "'that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor...'" *Id.* at 435 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968)).

### B. The Tenth Circuit's Decision Expressly Conflicts With The D.C. Circuit.

The Circuit Court held also that Congressman Schaffer could allege no injury because the unconstitutional mechanism by which his salary is adjusted results in a benefit to him—*i.e.*, higher pay. *Schaffer*, 240 F.3d at 885. But this Court has never held that a person who receives some putative benefit via a violation of the Constitution is thereby estopped from challenging that Constitutional violation. In fact, the Tenth Circuit's holding in this regard is directly contrary to the D.C. Circuit's holding in *Boehner* v. *Anderson* that "a Member of Congress...has standing to challenge the operation of a law that directly determines his rate of pay," *even if* that claim is that "his pay...was unconstitutionally increased." 30 F.3d, at 160.

Standing requires only an *injury*, not a decrease in financial assets. The injury requirement may be satisfied by injuries to contract or common law rights, *see Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137-138 (1939), or by violations of statutory rights, *see Warth* v. *Seldin*, 422 U.S. 490, 514 (1975), or even the "desire to use or observe an animal species." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 155, 562-563 (1992). And, more relevant to this case, the injury can be a violation of the Constitution's structural limitations on the federal government. *Flast* v. *Cohen*, 392 U.S. 83 (1968). The fact that such a violation results in a larger paycheck for Congressman Schaffer does not change the nature of a person's interest in "specific bulwark[s] against such potential abuses of governmental power." *Id.* at 104. As the D.C. Circuit held in *Boehner*, "[w]e do not think it the office of a court to insist that getting additional monetary compensation is a good when the recipient, a congressman, says that in his political position it is a bad." 30 F.3d, at 160.

It would be anomalous indeed for this Court to hold that an injury as attenuated as a change in "market conditions" is sufficient to establish standing, *Clinton* v. *New York City*,

524 U.S. 417 (1998), but that a Congressman and a taxpayer, the two people in the best — indeed, the *only* — positions to bring a case alleging a violation of the Twenty-Seventh Amendment, do not.

For these reasons, the Circuit should have followed the holding of the D.C. Circuit in *Boehner*. Here, however, the Circuit Court expressly declined to follow *Boehner*. *See Schaffer*, 240 F.3d at 885 n.7. This creates a conflict between the Circuits, which this Court alone can remedy.

## CONCLUSION

The Tenth Circuit's holding is particularly troubling because its failure to recognize either taxpayer or member of Congress standing renders the Twenty-Seventh Amendment a dead letter. Although this Court has previously noted that "the assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing," *Schlesinger* v. *Reservists to Stop The War*, 418 U.S. 208, 227 (1974), this Court has never gone so far as to essentially nullify an *entire Constitutional amendment* by such reasoning.

If the Constitution should be read in such a way as to grant meaning to every provision, *Lopez*, 514 U.S. at 589 (1995) (Thomas, J., concurring), it is particularly inappropriate to read the Article III case or controversy requirement in a way which would prevent *anyone*—either Congressmen on the receiving end of the paychecks, or taxpayers on the giving end—from suing to enforce the provisions of an entire constitutional amendment. In fact, in the speech with which he introduced his slate of amendments, including his proposal that would eventually become the Twenty-Seventh Amendment at issue here, James Madison noted that if amendments "are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive;

they will be naturally lead to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." James Madison, *Speech in the House of Representatives*, (June 8, 1789), *reprinted in* MADISON: WRITINGS 449 (J. Rakove, ed., 1999); *see also Boehner*, 30 F.3d, at 161 ("it would be an abuse of our equitable discretion not to hear Mr. Boehner's case").

The writ of *certiorari* should be granted so that the Tenth Circuit's bar on standing, which has nullified an entire constitutional amendment, can be lifted.

Respectfully submitted,

John C. Eastman
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman University
School of Law
One University Dr.
Orange, CA 9866
(714) 628-2587

Edwin Meese III
*Counsel of Record*
214 Massachusetts Ave., N.E.
Washington, D.C. 20002
(202) 546-4400

Richard Epstein
1111 E. 60th St.
Chicago, IL 60637

*Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence*

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